Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang @ Tham Sow Seng & Ors

HIGH COURT (TAIPING) — ORIGINATING SUMMONS NO 24–61 OF 2000
VT SINGHAM JC
13 OCTOBER 2000

Civil Procedure *— Summary possession of land — Application for — Whether proper case to be considered under O 89 of the Rules of the High Court 1980 — Whether triable issues existed — Whether appropriate for plaintiffs to resort to O 89 of the Rules of the High Court 1980 to obtain possession — Rules of the High Court 1980 O 89*

Land Law *— Adverse possession — Squatters — Whether persons occupying land were squatters — Whether submission of application to authority, payment of assessment and providence of amenities impliedly grant a licence or consent or permission from the state authority to live on the land — Whether a squatter has a right in law or in equity — Whether adverse possession of land recognized*

The plaintiffs applied by an originating summons under O 89 of the Rules of the High Court 1980 ('RHC') for an order to recover their land and possession thereof ('the said lot') which was being occupied by the first and second defendants and other occupiers without their permission or agreement. On 26 June 2000, the plaintiffs had obtained judgment against the second and third defendants by default as they were absent. The first defendant contended, inter alia, that he had a right to remain on the said lot as the owner or in equity as he had applied for a housing lot on the said lot and that he was directed to complete the form only in 1989, that he had been paying assessment for his house to Majlis Perbandaran Taiping since 1984, and he was surprised when he was informed that the plaintiffs have been given title to the said lot in 1999. The first defendant also contended he was provided with the supply of water, electricity and litter bins. The issues for determination is whether the first defendant had a right in law and in equity to remain on the said lot and whether summary possession of the said lot under O 89 of the RHC is suitable against the first defendant.

Held, allowing the plaintiffs' application with costs:

(1) Merely submitting or applying to the state authority for a piece of land or for the lot which the first defendant was occupying does not either impliedly or expressly grant a licence, consent or permission from the state authority for the first defendant to live or continue to live on the said lot (see 596B); *Bohari Bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 distinguished.

(2) An illegal squatter has no protection in law or in equity to enable him to claim a right to live or continue to live or occupy the said lot which the plaintiffs as the registered owners are entitled and

have every right to evict the first defendant by summary procedure. Merely erecting a building unlawfully on the plaintiffs' lot and occupying is not sufficient to create any right or equity against the rightful owner of the said lot who is protected by title. The first defendant has also no protection in equity because s 48 of the National Land Code 1965 (see p 596E–F, H).

(3) Mere payment of assessment for the first defendant's house does not impliedly give him the permission or consent to continue to live on the said lot as the charges of assesment is imposed by the local authority because ss 127 and 163(1) of the Local Government Act 1976 empowers the local authority to impose charges. These charges are imposed by the local authority because there is a building constructed within the jurisdiction of the local authority (see p 599C–D).

(4) By providing the water, electricity and litter bins does not necessarily mean that the state authority had impliedly given the first defendant permission to live or continue to live on the said lot. Furthermore, there was no averment of this fact in the affidavit in reply of the first defendant and there was no averment since when those services or amenities were provided to the house in which the first defendant was living in (see pp 597H–598A).

(5) In this case, there is no issue of law or fact to be tried, there is no reasonable doubt as to the claim of the plaintiffs to recover possession of the lot and there is no serious dispute raised by the first defendant between himself and the plaintiffs. Further, there is no dispute that the first defendant has not obtained the permission of the plaintiffs and therefore the court finds that the plaintiff is entitled to use the procedure for summary possession under O 89 of the RHC (see p 601E–F).

[Bahasa Malaysia summary

Plaintif-plaintif memohon, melalui satu saman pemula di bawah A 89 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), untuk satu perintah untuk mendapatkan balik tanah dan milikan mereka ('lot tersebut') yang sedang didiami oleh defendan pertama dan kedua dan penghuni-penghuni yang lain tanpa izin atau persetujuan mereka. Pada 26 Jun 2000, plaintif-plaintif telah mendapatkan satu penghakiman ingkar menentang defendan kedua dan ketiga kerana mereka tidak hadir. Defendan pertama berhujah bahawa dia berhak menetap di lot tersebut sebagai pemilik ataupun dalam ekuiti kerana beliau telah memohon untuk lot perumahan di lot tersebut dan bahawa beliau telah diarahkan melengkapkan borang tersebut hanya pada tahun 1989, sedangkan beliau telah membuat bayaran taksiran bagi rumahnya kepada Majlis Perbandaran Taiping sejak 1984, dan beliau terperanjat apabila diberitahu bahawa plaintif-plaintif telah

diberi hakmilik bagi lot tersebut pada tahun 1999. Defendan pertama juga berhujah bahawa beliau dibekali bekalan air, tenaga elektrik dan tong sampah. Isu-isu untuk dipastikan sekarang ialah sama ada defendan pertama mempunyai hak di bawah undang-undang dan ekuiti untuk menetap di lot tersebut dan sama ada milikan ringkas lot tersebut di bawah A 89 KMT sesuai dalam menentang defendan pertama.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Dengan hanya mengemukakan atau memohon pihak berkuasa negeri bagi sebidang tanah atau bagi lot yang sedang didiami defendan pertama tidak memberikan lesen secara nyata atau tersirat, persetujuan atau izin dari pihak berkuasa negeri agar defendan pertama boleh menetap atau terus menetap di lot tersebut (lihat ms 596B); *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 dibezakan.

(2) Penghuni setinggan haram tidak mempunyai perlindungan di bawah undang-undang atau ekuiti untuk membolehkannya menuntut sesuatu hak untuk menetap atau terus menetap atau mendiami lot tersebut tetapi plaintif-plaintif, sebagai pemilik berdaftar, berhak berbuat demikian dan mempunyai segala hak mengusir defendan pertama menggunakan prosedur ringkas. Hanya mendirikan sebuah bangunan secara haram di atas lot plaintif-plaintif dan menetap di situ tidak mencukupi untuk mewujudkan apa-apa hak atau ekuiti menentang pemilik sebenar lot tersebut yang dilindungi hakmilik. Defendan pertama juga tiada perlindungan di bawah ekuiti disebabkan s 48 Kanun Tanah Negara 1965 (lihat ms 596E–F, H).

(3) Pembayaran taksiran bagi rumah defendan pertama tidak, secara tersirat, memberikannya persetujuan atau izin untuk terus menetap di lot tersebut kerana caj taksiran itu dikenakan oleh pihak berkuasa tempatan dan ss 127 dan 163(1) Akta Kerajaan Tempatan 1976 memberikan kuasa kepada pihak berkuasa tempatan untuk mengenakan caj. Caj-caj ini dikenakan oleh pihak berkuasa tempatan kerana sebuah bangunan telah didirikan dalam bidangkuasa pihak berkuasa tempatan (lihat ms 599C–D).

(4) Pembekalan air, tenaga elektrik dan tong sampah tidak seharusnya bermakna pihak berkuasa negeri telah secara tersirat memberikan defendan pertama izin untuk menetap atau terus menetap di lot tersebut. Lagipun, terdapat tiada penegasan fakta ini di dalam afidavit membalas defendan pertama dan tiada penegasan memberitahu sejak bila perkhidmatan atau kemudahan tersebut dibekalkan ke rumah yang didiami defendan pertama (lihat ms 597H–598A).

(5) Dalam kes ini, tidak terdapat isu undang-undang atau fakta untuk dibicarakan, tidak terdapat keraguan munasabah mengenai

tuntutan plaintif-plaintif untuk mendapatkan semula milikan lot tersebut dan tidak terdapat pertikaian yang serius yang dikemukakan oleh defendan pertama antara beliau dan plaintif-plaintif. Tambahan lagi, tidak terdapat pertikaian bahawa defendan pertama tidak mendapat keizinan dari plaintif-plaintif dan oleh-itu, mahkamah mendapati bahawa plaintif berhak menggunakan prosedur untuk milikan terus di bawah A 89 KMT (lihat ms 601E–F).]

Notes

For cases on summary possession, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4781–4793.

For cases on adverse possession, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1505–1557.

Cases referred to

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor [1991] 1 MLJ 343 (distd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)

Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors [1994] 1 MLJ 740 (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Or and Lesco Development Corp Sdn Bhd v Yap Chong Lan & Ors [1984] 2 MLJ 123 (refd)

Lembaga Kemajuan Negeri Pahang v D Chandran Temerloh High Court Saman Pemula No 24–101–2000 (unreported) (refd)

Menah bte Sulong @ Minah bte Sulong @ Aminah bte Sulong Vumsoo & Anor [1983] 1 CLJ 26 (refd)

Minister of Labour, Malaysia v Chan Meng Yue and another appeal [1992] 2 MLJ 337 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Norimah bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals [2000] 3 MLJ 129 (refd)

Salim bin Ismail dan lain-lain lwn Lebbey Sdn Bhd (NO 2) [1997] 2 MLJ 4 (refd)

Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor [1998] 4 MLJ 233 (refd)

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F) [1984] 1 MLJ 160 (refd)

Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 1 MLJ 12 (refd)

Legislation referred to

Local Government Act 1976 ss 127, 163(1)
National Land Code 1965 s 340(1)
Rules of the High Court 1980 O 89

Shah Rizal bin Alias (*Faisal Mohd Hanafiah* with him) (*Faizal Azian & Co*) for the plaintiffs.

P Awtar Singh Saini (*AS Saini & Assoc*) for the first defendant.

VT Singham JC:

Plaintiffs' claim for summary possession under Order 89 of the Rules of the High Court 1980

By an originating summons dated 30 March 2000 (encl 3), the plaintiffs applied under O 89 of the Rules of the High Court 1980 ('RHC') for an order to recover the land known as HS (D) L & M 12195 PT 12613 in Mukim Assam Kumbang, District of Larut and Matang, Negeri Perak ('the said lot') against the first and second defendants and occupiers of the said lot and being occupied by the first and second defendants and the other occupiers. The grounds of the plaintiffs' application is supported by an affidavit affirmed on 20 March 2000 by Mr Toh Chin Hin, a director of the plaintiffs' company. By the affidavit in support of the application, the plaintiffs, inter alia, stated as follows:

Affidavit of the plaintiffs' dated 20 March 2000 in support of the application (encl 2)

(a) The plaintiffs are the registered owners of the said lot and exhibited a copy of title to the said lot which was marked as exh 'TP1'

(b) That the defendants and all the other occupiers of the said lot have at all material times been living on the said lot without licence, permission and/or agreement from the plaintiffs, and exhibited a copy of the plan of the location of the said lot which is occupied by the defendants which was marked as exh 'TP2'.

(c) That the first defendant is living on premises known as No KB 14E and the second defendant is living on premises No KB 23A, and referred to the plan of the location and the plaintiffs do not know the other occupiers of the premises on the said lot.

(d) that the defendants are in fact not tenants or tenants holding over, and have entered into the said lot and continued to live without consent or agreement of the plaintiffs or without consent or agreement from any of the previous owners of the said lot.

(e) the plaintiffs have on several occasions claimed from the defendants and/or each and every occupier of the said lot to vacate the said lot and to return possession to the plaintiffs, which claim was done through the plaintiffs' solicitors who issued a notice of claim dated 3 December 1999 against the defendants, but the defendants have failed, refused and/or breached to comply with the said notice and a copy of the said notice was attached and marked as exh 'TP3'.

(f) as the registered owner of the said lot, the plaintiffs are not prevented from making this application.

In the circumstances, the plaintiffs prayer in the originating summons is for the plaintiffs to be granted possession of the said lot occupied by the

defendants and/or other persons who are occupying without permission or agreement and costs. In the meantime, it is important to mention at this stage, that on 26 June 2000, the plaintiffs had obtained judgment against the second and third defendants by default as they were absent.

First defendant's affidavit in reply dated 26 June 2000 (encl 17)

a) The first defendant, on the other hand, by an affidavit affirmed on 26 June 2000 has inter alia, denied the allegations of the plaintiffs as contained in their affidavit dated 20 March 2000, and that he has no knowledge that the plaintiffs are the registered owners of the said lot.

b) That he has applied for a housing lot on the government land in which his house has been constructed since 1976, and that he was directed to complete the form only in 1989 and attached a copy of the said application form from the Land Office Taiping, and a copy of the receipt for submitting the said application.

c) That he has been paying assessments for his house to Majlis Perbandaran Taiping since 1984 and attached copies of the receipts for the said payments which is marked as exh S-2.

d) Despite several requests the Land Office has, to date, failed and/or refused to issue the title to his house.

e) He was surprised when he was informed that the plaintiffs have been given title to his said land pursuant to a title which was issued in 1999.

f) That the Land Office did not negotiate with him to obtain his land in accordance with the standard procedures.

g) He believes that he has the right to the said lot as the owner or in equity, and he need not obtain the consent of the plaintiffs to continue to live on the said lot.

h) That he understands the plaintiffs have also obtained other land in his kampung, and that many of the directors of other development companies who have been given other pieces of land in the area of his kampung are members of the same family.

i) That he has been made to understand by his solicitor who he believes and in the circumstances the procedure under O 89 RHC has been misused.

The contents of the said application and the application form which was attached and marked as exh S-1 reads as follows:

Permohonan Untuk Tapak Rumah
Rancangan Perkampungan Tersusun
KAMPONG BANGGALI
XXXXXXXXXX
XXXXXXXXXX
XXXXXXXXXX
XXXXXXXXXX
XXXXXXXXXX
No Siri:
Bayaran berjumlah RM10.00 telah dijelaskan

Melalui Rt No: … pada …

I Butir-Butir Diri Pemohon
1 Nama Pemohon: SAM KOK SANG @ THAM SOW SENG K/P: 1693697 (Biru)
2 Alamat Surat Menyurat KB 14-E, Kampong Banggali, Jalan Simpang, Tpg.
3 Umur 49+tahun
4 Tempat dan Tarik Lahir: Kuala Kangsar – 6 December 1939
5 Lama tinggal di Daerah Larut & Matang: Lebih kurang 35
6 Pekerjaan: Berniaga Pendapatan: RM600 sebulan
7 Tempat Bekerja: Taiping
8 Nama dan Alamat: Persendirian

II Butir-butir
1 Nama: POH SIANG TIANG K/P: 1683440 (Biru)
2 Umur: 40 tahun
3 Tempat dan Tarikh Lahir: Parit Buntar, Krian
4 Pekerjaan: Suri rumahtangga
5 Pendapatan: RM … sebulan
6 Tempat Kerja:
7 Nama dan Alamat Majikan:

III Butir-butir tanggungan seramai 4 orang
1 Isteri 1 orang
2 Anak Lelaki 1 orang
3 Anak Perempuan 2 orang
4 Lain-lain tanggungan … orang

IV Keupayaan memajukan tanah dipohon
1 Jumlah Simpanan: RM8,000 (Wang tunai dalam tangan) Nama Bank: …
No Kira-kira:
2 Lain-lain

V Butir-butir Tanah Yang Dimiliki oleh Pemohon/atau suami/isteri

Jenis Kegunaan (Pertanian/Perumahan)	No Suratan Hakmilik	Mukim Bahagian	Kepunyaan
…	…	…	…

VI Tempat Tinggal Sekarang
1 Alamat Tempat Tinggal: KB 14-E, Kampong Banggali, Jalan Simpang, Taiping.
2 Rumah Sendiri: rumah didirikan di atas tanah kerajaan yang sama sedang di pohon.

VII Permohonan-permohonan untuk mendapat tapak rumah yang pernah dikemukakan ke Pejabat Tanah.

Kawasan	Tarikh	Keputusan	No Fail Pej Tanah
1Ada Memohon tetapi tidak berjaya sekalipun.			
2			

VIII Saya mengaku bahawa segala keterangan di atas adalah benar. Sekiranya mana-mana butir yang dikemukakan tidak lengkap atau tidak benar, maka saya faham yang permohonan saya ini boleh dibatalkan.
Tarikh: 13hb Oktober 1989(SAM KOK SANG @ THAM SOW SENG)
Tandatangan Pemohon

IX Perakuan Ketua Jabatan/Ketua Kampong/Penghulu
Bagi Kakitangan Kerajaan/Badan Berkanun.
Saya sahkan keterangan yang diberi di atas adalah benar.
Tarikh: 13 October 1989 T/tangan: … … …
HAJI MOHD JAIS BIN YUNUS
KETUA KAMPONG
COP JAWATAN: KOTA BARAT
ASSAM KUMBANG, TAIPING
Nota: Borang yang telah dilengkapkan hendaklah dikembalikan ke Pejabat Tanah, Taiping pada atau sebelum 15 Disember 1989.
UNTUK KEGUNAAN PEJABAT

Submissions of plaintiffs' counsel

1) Plaintiffs' application is under O 89 RHC by way of summary procedure to obtain possession of the said lot.

2) The plaintiffs are the registered owners of the said lot, and referred to the exhibit of the title to the said lot which is registered in the name of the plaintiffs.

3) There is no denial that the first defendant is living on the said lot and referred to the affidavit in reply of the first defendant (encl 17).

4) Prior to possession by the plaintiffs, the said land belonged to the Perak State Government.

5) The defendants did not obtain permission or consent from the plaintiffs.

6) The plaintiffs claim against the first defendant is in respect of the said lot and referred to exh TP 2, the plan of the location of the said lot and also referred to exh TP 3, the Notice of demand dated 3 December 1999 which was issued by the plaintiffs' solicitors to the defendants.

7) There is no relationship whatsoever between the plaintiffs and the defendants.

8) The first defendant is living on the said lot without the consent of the plaintiffs.

9) The first defendant is a trespasser simpliciter. He did not obtain consent from the previous owners of the said lot, the Perak State Government. He also referred to s 340(1) of the National Land Code 1965 ('NLC').

10) He referred to para 10 of the first defendant's affidavit in reply (encl 17) wherein the first defendant stated that he had the right to the said lot as the owner or in equity, and that he need not obtain the consent of the plaintiffs to continue to live on the said lot, to which he submitted that the first defendant had no right to live on the said lot.

11) He referred to para 6 of the first defendant's affidavit in reply wherein the first defendant had stated that he had paid assessments to Majlis Perbandaran Taiping since 1984 for his said house. On this contention by the first defendant, the plaintiffs' counsel submitted

that the said lot and house was within the jurisdiction of the Majlis Perbandaran Taiping, the local authority and referred to ss 127 and 163(1) of the Local Government Act 1976 which reads as follows:

> Section 127 Power to impose rates
> The local authority may, with the approval of the State Authority, from time to time as is deemed necessary, impose either separately or as a consolidated rate, the annual rate or rates within a local authority area for the purposes of this Act or for other purposes which it is the duty of the local authority to perform under any other written law.
> s l63 Provision for rating buildings on state or reserved land.
>
> (1) In the case of buildings situated on State land or on land reserved for a public purpose and not occupied by the Federal or State Governments the local authority, with the approval of the State Authority, may impose the rates referred to in s 127 upon the annual value or [improved value] of all or any of such buildings, and the occupiers of such buildings shall be liable to pay the said rates.
>
> (2) The provisions of this Part shall apply to any rate imposed under sub section (1) except that in the application thereof references to a 'holding' shall be deemed to be references to a 'building', and references to the 'owner' of a holding shall be deemed to be references to the 'occupier 'of a building.

12) The provisions of ss 127 and 163(1) of the Local Government Act 1976 do not mean that consent had been given to the first defendant to live on the said lot. He submitted that the local authority is entitled to impose charges for houses built, whether legally or illegally within their jurisdiction.

13) He referred to the case of *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 and submitted that the facts in *Bohari*'s case could be distinguished when compared to the facts as stated by the first defendant. The plaintiffs' counsel submitted that in *Bohari*'s case, the initial entry was valid and that this was a distinguishing factor to the facts in this case in which there is no evidence of any legal entry to the said lot.

14) The first defendant did not state in his affidavit in reply that he has obtained the permission of the state authority.

15) The plaintiffs' counsel also referred to the case of *Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 4 MLJ 233 and distinguished the facts to the first defendant's case. In *Shaheen*'s case, the plaintiffs' counsel submitted there was encouragement by the state authority but in the plaintiffs' case there is no evidence of any encouragement by the plaintiffs, the state authority or the predecessors in title.

16) Pursuant to the affidavit in reply of the first defendant (encl 17), there was no evidence or averment to state that the first defendant was encouraged or had obtained the consent of the state authority to occupy the said lot in order for the first defendant to claim any right to the said lot.

17) The plaintiffs' counsel referred to the case of *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740 at p 744.

18) In the circumstances, the procedure under O 89 of the RHC was correct and is in order and that there was no issue for trial.

In the circumstances, the plaintiffs' counsel submitted that there was no issue to go for trial as the first defendant is a trespasser and the plaintiffs should be given possession as prayed in the originating summons (encl 3).

Submissions of the first defendant's counsel

Counsel for the first defendant, on the other hand, submitted as follows:

1) There is triable issue to proceed for hearing.

2) He referred to para 3 of the first defendant's affidavit in reply (encl 17) which is basically a denial and lack of knowledge to paras 1–4 of the plaintiffs' affidavit in support of the originating summons.

3) That the first defendant had obtained the consent of the state government through Majlis Perbandaran Taiping, and that he had applied for a lot on the state land on which the first defendant's house had been constructed since 1976, and that the first defendant was directed to complete the application form only in 1989. He contended that the payment for assessment had been paid for 17 years since 1983 until the first half of 2000.

4) The premises belonging to the first defendant has been provided with all facilities, ie supply of water and electricity and litter bins. He relied on the cases of *Bohari* and *Shaheen* to support his arguments.

5) The issue is whether the first defendant had obtained the consent from the state authority, and if that is so, the first defendant is not a trespasser and that whether the proceedings could be brought under O 89 of the RHC.

6) From the facts in this case, and the cases he has relied on. O 89 of the RHC is not the proper mode of proceedings as there were triable issues and that the plaintiffs' summons should be dismissed with costs.

Reply — Submissions by the plaintiffs' counsel

(1) He referred to ss 127 and 163(1) of the Local Government Act 1976 and that the local government is only to fix the boundary for assessment.

(2) there was no permission given, even impliedly, by the state authority or the first of the of the said lot.

Issue

The main issue to be determined is whether, on the facts of the case, summary possession under O 89 of the RHC is suitable against the first defendant.

Findings of the court

As contended by the plaintiffs' counsel, this court is in agreement that the facts in *Bohari*'s case and *Shaheen*'s case are distinguishable and the principle enunciated in those two cases which supported the occupier's claim in those cases, does not apply to the facts in this case. In *Bohari*'s case. there was in fact a letter dated 25 October 1980 from the Collector of Land Revenue, Sabak Bernam which states that the state executive council had on 4 September 1980, approved the alienation of the land occupied and carrying out farming to the appellants and other selected settlers, which by implication means that there was continued consent implied or expressed by the state authority even after the TOL had expired.

In *Bohari*'s case. His Lordship Mohamed Azmi SCJ, in delivering the judgment of the Supreme Court, said:

> In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different.

On the facts in *Bohari*'s case, the Supreme court held that there were triable issues on the absence of either licence or consent as alleged by the respondent.

In *Shaheen*'s case, Zakaria Yatim FCJ, who delivered the judgment of the Federal Court, said at p 245.

> Similarly in the present case, if the initial entry of the settlers on the said land was unlawful, they had committed an offence under s 425(1)of the National Land Code. They could also be evicted under O 89 for being squatters simpliciter. From the evidence, the state government knew of their presence on the said land from December 1981. No action was taken to charge them under the National Land Code for illegally occupying the said land. No proceeding was taken to evict them under O 89. From January1988 the Menteri Besar knew about the settlers. He' approved the renovation of their surau. He knew that the settlers were provided with water supply, roads and a community hall. As stated earlier, when the land was given to PKNS, it knew about the settlers. In our opinion, there is an arguable case that the settlers occupied the said land' with acquiescence of the State Authority.

In *Salim bin Ismail dan lain-lain lwn Lebbey Sdn Bhd (NO 2)* [1997] 2 MLJ 4, Ahmad Fairus JCA (as his Lordship then was and now FCJ) referred to the Supreme Court Practice 1991, Vol 1 at p 1576 which, inter alia, states as follows:

> On the other hand, like the default and summary procedures under O 13 and O 14 of the RHC, this order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto. Where.the existence

> of a serious dispute is apparent to the plaintiff, he should not use this procedure. If he does, the action may be struck out (Henderson v Law[1984] 17 HLR 237 (CA)).

In the case before the court, there is no such letter of approval from the state authority in respect of the said lot, apart from just a bare application from the first defendant, which he claims was submitted to the state authority in 1989. This court is of the view that by merely submitting or applying to the state authority for a piece of land or for the lot which the first defendant is occupying, does not either impliedly or expressly grant a licence, consent or permission from the state authority for the first defendant to live or continue to live on the said lot. The allegation in para 5 of the first defendant's affidavit in reply does not state whether the first defendant was advised by the state authority or any representative of the state authority for him to submit the application form for the said lot, and that in the meantime he could continue to occupy the said lot pending a reply from the state authority. The first defendant did not even state who had in fact instructed him in 1989 to submit the said application form. This court is of the view that the fact that the first defendant had submitted the application form to the state authority for the said lot would show that he has not obtained the permission or consent of the state authority for him to live or occupy the said lot. It would also show that he had entered into the said lot and continued to occupy it as an illegal squatter notwithstanding that he has constructed the house as claimed by him, and that he has paid assessment to Majlis Perbandaran Taiping. It is the view of this court that an illegal squatter has no protection in law or in equity to enable him to claim the right to live or continue to live or occupy the said lot which the plaintiffs, as the registered owners are entitled and have every right to evict the first defendant by summary procedure. In fact, it is the view of this court that merely erecting a building unlawfully on the plaintiffs' lot and occupying it is not sufficient to create any right or equity against the rightfu; owner of the said lot who is protected by title.

Therefore, the fact that the first defendant had applied to the said authority for the said lot does not *ipso facto* give him the right to live or to continue living on the said lot unless he could show that was in fact given to him either expressly or impliedly. (the permission or consent or agreement of the plaintiffs or the plaintiffs' predecessor in title or the state authority for him to live or continue to live on the said lot.) As the first defendant had failed to show this consent or permission, the plaintiffs are entitled to summary eviction against the first defendant ,and there is in fact no issue for trial. The first defendant has also no protection in equity because s 48 of the NLC which reads as follows:

> No adverse possession against the State
>
> No title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever.

The first defendant's second contention that he had paid assessment for his house to Majlis Perbandaran Taiping since 1984 and supported by receipts

also does not give the first defendant the permission or right to live on the said lot which belongs to the plaintiffs. In fact, the whole of the first defendant's affidavit in reply expressly showed that his grievance was with the state authority for not having approved his application for the said lot and that his complaint was no doubt against the land office, and that impliedly there was some discrimination in the way the said lot was approved to other owners. It is clear that the crux of the first defendant's claim which can be derived from his affidavit is that he has some grievance against the state authority for approving land unfairly to several individuals and that his complaint or grievance had nothing to do whatsoever against the plaintiffs' claim. It is the view of this court, therefore, that the first defendant should direct his grievance to the state authority and not to use that complaint with a view to deprive the plaintiffs from obtaining summary eviction against him.

By his affidavit in reply, the first defendant, had in fact, impliedly admitted that he has not obtained the permission of the plaintiffs to live or occupy the said lot as stated in para 10 of his affidavit in reply, wherein he stated that he need not obtain the permission of the plaintiffs to live on the said lot as he believes that he has a right to the said lot as the owner or in equity. The first defendant has not stated the legal basis for him to claim his right on the said lot, and the legal basis as to how he is deemed to be the owner of the said lot either in law or in equity. The first defendant has also not stated in his affidavit in reply the basis of his initial entry to the said lot and whether he has obtained the consent or permission or agreement of the plaintiffs' predecessor in title or the state authority except to state that his house was constructed since 1976, and that he has completed an application form in 1989 to apply for the said lot. There was also no acknowledgement or response in writing from the state authority to his application except for a copy of the receipt for RM10 which was attached to his said application.

In *Lembaga Kemajuan Negeri Pahang v D Chandran*, vide Temerloh High Court Saman Pemula No 24–101–2000 (unreported), there was at least a written reply from the state authority that the defendant's application in that case had been given attention and will be raised for decision by the state executive council, which by implication gives the impression that the defendant could continue to occupy the land in question, which in fact is an arguable point to oppose summary eviction but in the plaintiffs' case before this court, the first defendant has not shown any such reply from the state authority except for his bare application fform which certainly is not a criteria or a ground to oppose summary eviction by the plaintiffs who are the registered owners of the said lot.

As for the contention by the first defendant's counsel that the supply of water and electricity and litter bins had been provided, this court with regret is not able to accept that submission as a ground for him to continue to live on the plaintiffs' lot because firstly, by providing the said services or amenities it does not necessarily mean that the state authority has impliedly given the first defendant permission to live or continue to live on the said lot. Secondly, there was no averment since when the services or amenities

were provided to the house in which the first defendant lives or continues to live and thirdly, the facts, even if they were true were not stated or raised in the affidavit in reply of the first defendant. It is the view of this court that a statement which was made by the first defendant's counsel from the bar table and not pleaded in the affidavit is not acceptable as evidence on behalf of the first defendant. This court is of the view that a statement of fact which is used or relied as a ground to support to prove or disprove or to oppose an application for summary possession of any other application before the court must necessarily be expressed in the affidavit and not raised by way of a statement from the bar table by counsel for one of the parties or litigants. In *Minister of Labour, Malaysia v Chan Meng Yue and another appeal* [1992] 2 MLJ 337 at p 342, his Lordship Harun Hashim SCJ, in delivering the judgment of the Supreme Court said in response to the submission of senior federal counsel for the Minister of Labour, Malaysia:

> ... it was suggested by the learned senior federal counsel who appeared for the Minister that the policy decision was that as there is an alternative remedy available to the respondent to seek relief in the civil court the Minister has acted reasonably. That may be so but the Minister has not said so and we cannot accept a statement from the Bar as being the reason the Minister had in arriving at his decision. We can only look at the facts as stated in the affidavits before this court.

In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 287, his Lordship Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, said:

> The only reference to the delay point is to be found in the address of counsel for the respondent in the court below and the explanation is in reality that of counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is.deprecated. To act as the learned judicial commissioner did in this case, is to ignore the very basic tenets of the law of evidence that is applied by our courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered. But to ride roughshod over such an important point, as was done here does. little to advance the course of justice according to the law.

In *Menah bte Sulong @ Minah bte Sulong @ Aminah bte Sulong Vumsoo & Anor* [1983] 1 CLJ 26, his Lordship HT Ong (CJ) in delivering the judgment of the Federal Court, said:

> I think it is necessary in this case to emphasize once again that the Courts should give their decisions in strict accordance with the pleadings.

In the circumstances, this court is not obliged to consider or take into account the statement by the counsel for the first defendant from the bar table in reference to the supply of electricity and water to the first defendant's house in order to decide whether there was an issue to be tried as firstly, that statement is not affidavit evidence and secondly, that

A statement alone or taken as a whole does not even impliedly grant the first defendant permission to continue living on the said lot. This court finds that the first defendant is an illegal squatter or trespasser on the said lot which belongs to the plaintiffs. In two consolidated appeals in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Or and Lesco Development Corp Sdn Bhd v Yap Chong Lan & Ors* [1984] 2 MLJ 123, the B claim of the respondents to an equitable right to remain on their respective lots to which they have been resettled was disallowed by the Federal Court. In those cases, despite evidence to support the occupiers' claim, which was agreed between the parties, that the collector of land revenue had granted permission to the occupiers to build houses on their lots and were able to C obtain water, supply on the collector's recommendation, the Federal Court reversed the decision of the High Court, which at the first instance, held that the claimant had acquired equitable rights to remain on their respective lots.

As for the contention by the plaintiffs' counsel that mere payment of assessment for the first defendant's house does not impliedly give him the D consent or permission to live on the said lot because ss 127 and 163(1) of the Local Government Act 1976 empowers the local authority to impose charges, this court agrees that the charges of assessment is imposed by the local authority because there is a building constructed within the jurisdiction of the local authority, and in this case, the Majlis Perbandaran E Taiping, and that fact alone, being payment of assessment, does not grant the first defendant permission or consent to continue to live on the said lot. The local authority is not duty bound to inquire whether the occupier/occupiers of the building on the said lot are the registered owners, the tenants or the licensees or the tenants holding over. As long as the building is occupied, the local authority, being the Majlis Perbandaran, is entitled to F collect payment for assessment under the Local Government Act 1976.

In order to oppose this summary procedure, this court is of the view that the first defendant ought to have at least adduced evidence, and/or produced a letter from the state authority or the plaintiffs predecessor in title to show that the first defendant's initial entry and his continued occupation of the said lot was with the consent, permission or agreement of G the state authority or the plaintiffs' predecessor in title. As the first defendant had failed to show or prove any of the above requirements, the plaintiffs are entitled to summary eviction. In fact, there is no evidence or even any contention by the first defendant that he was encouraged by any particular person/s or any relevant authority to live on the said lot, and/or to built a house and to continue to live on the said lot. This is a clear case of H the first defendant deliberately going into another's land, put up a building and living there unlawfully and that he does not even come under the class or category of persons whose entry was lawful at the inception, but has subsequently ceased to be so.

Based on the first defendant's affidavit in reply, this court is of the view I that there is no serious dispute or arguable issues which is apparent to the plaintiffs, and which prevents the plaintiffs from using this summary procedure. This court is not unmindful of the principle which does not

allow the courts to resolve conflict of evidence on affidavits. In *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, at p 217, their Lordships in the Privy Council said that:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon are relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under s 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.

This principle was subsequently applied in *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F)* [1984] 1 MLJ 160 at p 163 wherein his Lordship Lee Hun Hoe CJ (Borneo) in delivering the judgment of the Federal Court, said:

> It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible.

In *Norimah bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2000] 3 MLJ 129, his Lordship Gopal Sri Ram JCA said that summary procedures under O 89 of the RHC is not applicable to cases in which arguable issues have been raised.

However, this court is of the view that in the plaintiffs' case before this court, there is no conflict of evidence on affidavits, except that the first defendant's affidavit seemed to disclose that he had a grievance against the state authority, which requires no investigation for the purpose of this summary eviction.

Unless there are disclosed facts in the first defendant's affidavit in reply which calls for investigation or could only be decided on hearing oral evidence, this court cannot just deny the plaintiffs' claim for summary eviction. In this case, as this court has already stated herein before, the first defendant's grievance or claim is entirely against the state authority and not against the plaintiffs, and nothing whatsoever has been raised in his affidavit to call for farther investigation so as to prevent the summary procedure for eviction. This court is of the view that if the courts were to lean too much in favour of people who enter illegally into land belonging to others and thereafter allege or attempt to claim interest in equity with the view to oppose the application for summary eviction, it will not only frustrate registered owners' claims for summary eviction against illegal squatters but may result in registered owners resorting to self help remedies, which no

doubt will have other consequences and is not encouraged as it might lead to breaches of the peace.

This court is also of the view that there was no need for an affidavit in reply by the plaintiffs to the first defendant's affidavit in reply, as there was nothing for the plaintiffs to rebut because the first defendant had not raised any issues against the plaintiffs to warrant a reply. In *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 1 MLJ 12 at p 16, his Lordship Edgar Joseph Jr SCJ, in delivering the judgment of the Supreme Court, said:

> The allegation of assault by the appellant's sister, without anything more, was hearsay as it was wholly unsupported by any evidence. Therefore, there was no need for an affidavit of denial to be filed by the prosecution as there was nothing to rebut and the concession by the prosecution that the assault was common ground was erroneous, and was not binding on the court.

The facts in *Esso Malaysia Bhd*, the case referred to by the plaintiffs' counsel has no relevance to the facts in this case before the court. The facts briefly in *Esso Malaysia Bhd*, one of the issues was whether a tenancy or licence was created and whether there was a proper determination of the licence, if a licence was created. Also, that the plaintiffs had admitted that the defendants had entered into occupation of the lands with their licence or consent, but that licence or consent had already been withdrawn or terminated, and that the defendants had no right to continue to remain on the lands. Nevertheless, the court in that case still granted an order to the plaintiffs to recover the lands under O 89 of the RHC.

In the first defendant's case, there was no issue of law or fact to be tried, there is no reasonable doubt as to the claim of the plaintiffs to recover possession of the lot, and there is no serious dispute raised by the first defendant between himself and the plaintiffs. Further, there is no dispute that the first defendant had not obtained the permission of the plaintiffs and therefore this court finds that the plaintiffs are entitled to use this procedure under O 89 of the RHC.

In the circumstances, and for the reasons stated above, this court is of the view that there are no bona fide triable issues on the facts in this case which has to proceed for trial.

Therefore, the originating summons for summary eviction by the plaintiffs under O 89 of the RHC and pursuant to encl 3 is allowed with costs.

Plaintiffs' application allowed with costs.

Reported by Moy Saw Han